No. 797. 36 Ex. 105

Brief of Mr. McGee for P. E. (on mo

Supreme Court of the United States.

OCTOBER TERM, 1896.

Filed May 7, 1897

RODMAN M. PRICE, MADELINE PRICE, GOVERNEUR PRICE, FRANCIS PRICE and E. TRENCHARD PRICE,
Plaintiffs in Error,

vs.

ANNA M. FORREST and CHARLES BORCHERLING,
Defendants in Error.

In Error to the Court of Errors and Appeals of New Jersey.

Brief of Flavel McGee on motion of the defendant in error to dismiss or affirm in the above entitled cause.

The defendants motion is twofold: First, to dismiss the writ because Alexander T. McGill, the Chancellor, presiding Judge of the Court of Errors and Appeals in the last resort in all causes in New Jersey, was not Chief Justice, or Judge, or Chancellor of the court rendering the judgment or passing the decree complained of in the writ of error and, second, to affirm the decree below on the ground that the question on which jurisdiction depends is frivolous.

I.

As to the motion to dismiss.

The amended and present Constitution of New Jersey, article 6, section 2, provides that the Court of

Errors and Appeals shall consist of the Chancellor the Justices of the Supreme Court and six Judges, or a major part of them.

1. Gen. Stat. of New Jersey, pp., LIX.

The act entitled "An Act relative to the Court of Errors and Appeals," Revision approved March 27, 1874, speaking of said court, provides, that the Chancellor, when present, shall be the president of the court; in case of his absence the Chief Justice of the Supreme Court, and in case of his absence the senior in office of the Justices of the Supreme Court who may be present.

1. Gen. Stat., pp. 1021, section 3.

In other words, by this statute, the Chancellor is made the first in office of the members of the Court.

The statute of the United States, under which writs of error to state courts is taken, provides, that a citation, when it is issued by the Supreme Court to a state court, shall be signed by the Chief Justice, or Judge, or Chancellor of such Court rendering the judgment or passing the decree complained of, or by a Justice of the Supreme Court of the United States, in no case designating which of the Judges thus mentioned is to perform the service, nor in any wise indicating that the signature must be made by a Judge who tried the cause, but on the contrary, manifesting, by the authority given to a Justice of the Supreme Court of the United States who did not try the cause, that the intention of the statute was not to secure the service in that behalf of one who tried the cause, but of the chiefest Judge of the court of last resort of the State, or of a member of the Federal Supreme Court.

In the case of Bartemeyer vs. Iowa, 14 Wal. 26, it was held by this Court that not only must the writ be allowed by one of the Justices mentioned in the Federal statute in order to insure jurisdiction, but that where a state court consisted of a chief justice and three associate justices, the writ must be allowed by the chief justice of the court if allowed by any justice of that court, and that an allowance by one of the associate justices would be bad.

Nowhere is there intimated, either in the statute or adjudication of this court any intention to confine the right of allowance to one of the judges who heard the cause, but on the contrary it is distinctly affirmed that the allowance must be made by the chiefest of the justices of the court to which the right of allowance is committed.

As must appear by this grouping of authorities, the Chancellor is made by the Constitution and statute of New Jersey the chiefest of the Justices of the Court of Errors and Appeals. He is mentioned first in the Constitution, and is specifically appointed by the statute to preside when present, and in point of fact he is the head of the Court, and the head of the judiciary of the State of New Jersey.

I take it that the law is not intended as a net, in the technicalities of which practitioners can be caught and defeated against justice.

In view of the decision in Bartemeyer vs. Iowa, what must a practitioner assume as the law in seeking for a Judge to sign his citation. It is evident from the provision of the Federal statute that he is not expected to carry his papers to Washington for an adjudication of his right to the writ, otherwise the permission to seek a Judge of the Court of his State would not have been conceded to him, and in further

view of the decision in the Bartemeyer case, that judge, so to be sought by him, is to be the highest judge of the highest court. What is he to conclude but that he will be right, if he seeks that Judge and presents the case to him?

The contention of my learned friends is that the Chancellor was not the Chief Justice, or Judge, or Chancellor of the Court rendering the judgment, because he sat below and was thereby incapacitated to sit in that particular case, whereas the constitution and statute answers that he is the President of it.

That Alexander T. McGill was Chancellor is a question of fact, and, I suppose, cannot be contested at this stage of the case, but if so, I refer the Court to the last New Jersey Equity Report, the 9th of Dickinson, wherein Alexander T. McGill is set down as Chancellor and Ordinary, and to the record of this cause, now on file, wherein it appears that he is in point of fact the Chancellor from whose decree the appeal was taken to the Court of Errors and Appeals.

In what position would we stand before the Court if I had applied to any other Judge of said Court? The Bartemeyer case told me that I must go to the highest Judge of the Court. The Chancellor is the highest Judge of the Court, and if I go to any other, I take the risk of being dismissed under the case cited.

Moreover, there was peculiar propriety in applying to the Chancellor. He it was who heard the case below; he it was whose decision was adverse to the defendants below, who were the appellants in the Court of Errors and Appeals, and who are the plaintiffs in error here, and it was his decision, adverse to the plaintiffs in error, which had been affirmed by the Court of Errors and Appeals.

If there was any Judge in the whole State peculiarly acquainted with the cause, and all the questions therein involved, it was he, and if there was any Judge to be found, whose interest lay against allowing the appeal, it was he, because his opinion, adverse to the plaintiffs in error had been affirmed.

I submit, therefore, that a Court, of the dignity of this Court, will not dismiss this writ of error for the reason assigned by the defendants in error. I assume that the primary object of every Court is to do justice, and not to deprive suitors of their rights by reason of the misapprehension of counsel, even if they be found to have been guilty thereof.

II.

The motion to affirm.

This motion is made under subdivision 4 of rule 6 of the Supreme Court, and in order to its success, it must appear by the record that the writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument. That this state of affairs cannot be predicated in the cause before the Court a reference to the record now on file, but not on file when the motion was filed, will make manifest.

The record discloses that Rodman M. Price, now deceased, was by an Act of Congress, approved February 23, 1891, awarded certain moneys, which act was in the words and figures following, to wit:

"An Act for the Relief of Rodman M. Price."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, that the Secretary of the Treasury be, and he is hereby authorized and directed to adjust upon

principles of equity and justice, the accounts of Rodman M. Price, late purser in the United States Navy, and Acting Navy Agent at San Francisco, California, crediting him with the sum paid over to and receipted for by his successor A. M. Van Nostrand Acting puser, January 14, 1850, and pay to said Rodman M. Price *or* his heirs out of any money in the Treasury not otherwise appropriated any sum that may be found due him upon such adjustment."

"Approved February 23, 1891."

As will appear by the answer of the defendants below, Rodman M. Price, who was afterwards Governor of New Jersey, was in his early days, purser of the United States Navy, and Acting Navy Agent at San Francisco prior to and up to the year 1850. That about that time he was relieved of his office, and one Van Nostrand designated as his successor at that station, and that on the 14th of January, 1850, he advanced to said Van Nostrand Seventy-five thousand dollars out of his private funds, for which he took the receipt of said Van Nostrand as acting purser, but without the approval or signature of the commanding officer thereat. That this money had never been returned to him by the United States, but that on the contrary, all liability therefor had been denied, and under the opinion of Caleb Cushing, the Attorney General, was determined not to be a valid claim aginst the Government and that the moneys awarded by the Act of Congress were therefore in the nature of gratuity, and the plaintiffs in error claimed that the gift created by the act was one to Governor Price in so far as he might receive the same, and to his heirs as original takers of the whole or any part thereof not drawn by him. It further appears by the case that under this Act about $75,000.00 were awarded by the Government.

It further appears by the case that Samuel Forrest, many years ago obtained a judgment at law, against Governor Price, and that on the strength of that judgment his widow filed a creditor's bill in the Court of Chancery of New Jersey, in which Mr. Borcherling was appointed a receiver in execution.

It further appeared that there had been a decree of the Court of Chancery, directing Gov. Price to convey to this receiver all his property and the evidence thereof, and especially to endorse and deliver to the receiver four drafts received by him from the Assistant Treasurer of the United States for the sums of $2,704.08, $13,500.00, $20,000.00, and $9,000.00 respectively of said moneys, and enjoining him and his agents from intermeddling with the receiver in regard thereto.

This order Gov. Price disregarded, collected the drafts, was attached for contempt, and died pending the proceedings in attachment, and subsequently the bill in this cause was filed against the present plaintiffs in error, his children and only heirs, reciting the foregoing proceedings and orders, the death of Gov. Price, that the Treasury Department had paid said amounts to Gov. Price; that there still remained in the Treasury about $23,000.00 of said moneys awarded under said act; that the Prices' right to all the balance of said moneys had passed to the Receiver; that the present plaintiffs in error had no right thereto or therein, and praying that they may be restrained from making any demand for said balance in the Treasury upon the Government, the Secretary of the Treasury, or any officer thereof, and that they may be decreed to pay the same to the Receiver.

To this bill, pleas were filed, setting up the Act of Congress above referred to; the facts upon which it

was founded; the death of Gov. Price, and that the defendants, the present plaintiffs in error were his heirs, and that they, under said Act and the laws of the United States were entitled to the balance thereof remaining in the Treasury.

These pleas were overruled by the Chancellor, his decree was appealed from to the Court of Errors and Appeals, and was there affirmed, and thereupon the defendants below, the present plaintiffs in error, filed an answer, setting up substantially the same facts, and claiming the right to said moneys under the said Act of Congress as heirs of said Rodman M. Price, alleging that no will of the said Price had been probated; that he left no estate; that no letters of administration had been issued thereon, and that they had no assets from him; denying the right of the Court of Chancery to sequester the moneys in the Treasury of the United States; denying the right of the complainants, the present defendants in error, to the moneys, and alleging their own exclusive right thereto under said Act of Congress and the laws of the United States.

The cause was heard upon bill and answer, and the defendants below, the present plaintiffs in error, were by final decree enjoined, as appears by the record from making any demand upon or application to the government, the Secretary of the Treasury, or any officer of the Treasury for any part of the said money remaining in the Treasury at the time of the filing of the said bill of complaint.

From this decree an appeal was taken to the Court of Errors and Appeals, and was there affirmed in so far as applicable to the questions raised on the final hearing.

The opinion of the Court, overruling the pleas, as will be seen by the record, deals principally with the question of the right of the Court of Chancery to deal with these moneys in the Treasury of the United States, and holds that the moneys awarded by the act were not a gratuity; that the words "or his heirs" were simply words of succession; that the assignment of the claim against the United States ordered by the Court of Chancery was not prohibited by section 3,477 of the Revised Statutes of the United States; that an assignment so ordered was an assignment by operation of law; that the evils sought to be avoided by that section were not within the reach of this decree, and that the Court of Chancery had jurisdiction to determine the right of distribution of such claim in payment of a judgment from the claimant to his creditors.

The opinion of the Court on the appeal from the final decree, as will be seen by the record, held that the appeal brought up for decision the rights of the parties under the act of Congress set out in the pleadings, and under section 3,477 of the Revised Statutes of the United States, and held that these questions, having been passed upon in the opinion of the Court on the appeal from the decree of the Chancellor overruling the pleas, the decree then appealed from, for the reasons there given, must be affirmed with costs; in other words, adopted so far as they applied the rulings of the opinion on the decree overruling the pleas, and affirmed the final decree therefor.

The right claimed by the defendants below, the present plaintiffs in error, was the right to the balance still remaining in the treasury of this money under this act of Congress, and under section 3,477 of the Revised Statutes of the United States, and the decision of the Court was against the right so claimed by the defendants, and I am unable to conceive of a case

where a Federal question is more explicitly disclosed with an adverse decision than this.

The claim made below was:

1. That the decree of the Chancellor was erroneous and illegal under section 3,477 of the Revised Statutes of the United States, for the reasons:

1. That the assignment was not freely made.

2. That no warrant for the payment thereof had been issued, and that the assignment ordered did not fall within any of the exceptions to the rule, namely, assignments in insolvency and bankruptcy, nor assignments by operation of law.

2. That under the act of Congress above stated, the decree should be reversed, for the reason that the defendants, as heirs of Rodman M. Price were, under that act, original takers.

And it was these particular claims, based upon these particular statutes of the United States, which were, by decree of the Chancellor and the affirmance of the Court of Errors and Appeals, decided adversely to the defendants below, the present plaintiffs in error.

And on the case below I cited, and cite now, the following cases:

St. Paul and Duluth Railroad Company vs. United States, 112 U. S., 733, wherein the Court held that the voluntary transfer of a claim against the United States, made by way of mortgage when made absolute by judicial sale was void, because the transfer was completed by judicial sale, and was, therefore, not voluntary.

Spofford vs. Kirk, 97 U. S., 484.

In that case Kirk had given orders on his agents in favor of third parties for the payment, out of funds to be collected from the government, both of which were accepted and sold to innocent third parties in good faith, and the court held that a court of equity had no jurisdiction in that case notwithstanding the voluntary assignment, because there was no warrant issued.

United States vs. Gilles, 95 U. S., 407, wherein this Court held that there could be no assignment of a claim at common law; that under section 3,477 of the Revised Statutes of the United States, any equitable right which might be held to exist was negatived, and that the assignment of the claim in question, not having contained in that case the formalities of the act, was void, and that the act creating the Court of Claims did not remedy the difficulty, and that the act operates on the claims themselves, and not as limitations on, or definitions of, the powers of those who are to adjust them, or adjudicate upon them; and further that that act was of universal application, and covered all claims against the United States, in every tribunal in which they might be asserted.

And I there contended, andhere contend, that these decisions under the Act covered every phase of this case:

1. That a valid assignment could not be made by judicial decree.

2. That no assignment was valid prior to the issue of a warrant, and :

3. That the inability to assign at common law was made permanent as to claims against the United States, and could not be abrogated by the order of a Court.

I further cited the case of Erwin vs. the United States, 97 U. S., 392, and Boodman vs. Niblack, 102 U. S., 556, in which the distinction between assignments by the order of a Court in a suit at law or in equity, and a transfer by assignment in bankruptcy or insolvency, was drawn; and I particularly called the attention of the Court below to the distinction between the point at issue, namely, the power of the Court to compel a transfer of the claim against the government, and that line of cases which hold that where the claimant has made an assignment, and the government officers have recognized and paid on it, he will not be allowed to set up the statute against it, as for example,

Bailey vs. United States, 109 U. S. 432.
Hobbs vs. Mc Lean, 107 U. S. 567.

I therefore contend, as I contended below, that under the decisions of this Court, this decree, being neither a voluntary assignment for the benefit of creditors, nor one in bankruptcy, nor by will, nor by descent, was not within any of the exceptions to Section 3477 of the Revised Statutes of the United States, and that in as much as it was not freely made, was not executed in the presence of two witnesses, and after the issuing of a warrant therefor, did not contain a recitation of a warrant, was not acknowledged before an officer therein provided, and did not contain the certificate thereby required, and lacked, and must lack, at least two of the requisites, namely, that of freedom of will and recitation of a warrant, that any assignment made thereunder was illegal, and must be void.

I further there contended, and contend here, that in as much as the Court had no power to order an assignment of this money which would be valid, or in anywise to give to the complainants below a right to recover from the Treasury, that the decree in the case,

enjoining the defendants below, these plaintiffs in error, from making demand upon or application to the government, the Secretary of the Treasury or any officer of the Treasury for the moneys, was likewise illegal, by reason of the fundamental principle of law in all jurisdictions, that a Court will not and cannot make a valid order which it has no power to carry out, and will not and cannot make a valid order to prevent a party from obtaining that which it has not power to take away from him.

Moreover, I contended there, and contend here, that under the proper construction of the Act of Congress of 1891, cited in the case, the language used is carefully devised to prevent the money from being sequestered for the creditors of Price. The language is "and pay to said Rodman M. Price, or his heirs."

It cannot be predicated that the Congress of the United States, made up as it is of representative men of the country, could have used this language, intending it to mean something else than its words express. It expressly avoids the use of the words executors, administrators, legal representatives, or any other language which can be held to indicate that the gift was to be solely to Price and those who under him could take his personal estate.

On the contrary it used the words "or his heirs" indicating a definite class of persons who do not take the personal estate of a decedent, and excluded legal representatives, against whom and whom only in the absence of assets, an action can be brought for the recovery of the debts of the decedent. Moreover there is force in the use of the disjunctive conjunction "or" which discloses the legislative intention not to confine the gratuity to Gov. Price and those claiming under him—but to create two beneficiaries—

namely the Governor if and in so far as he received it and his heirs in so far as he failed to do so during his life.

I therefore respectfully contend that a Federal question is presented; that the construction of two statutes of the United States is open to discussion in the cause, and that the claim under these statutes set by the plaintiffs in error has been decided adversely by the Court below, and further that the question of jurisdiction raised is not frivolous, but on the contrary one involving very considerable property interests, and upon which the plaintiffs in error are entitled to have the deliberate judgment of this Court.

Moreover that the proceeding is not for delay is manifested by the fact, first, that the litigation has been so stubbornly contested in the State courts, and second, that although the decree was rendered at the last term of the Court of Errors and Appeals at which opinions have not yet been rendered, and although the opinion of the court of last resort was not filed until after the taking of the writ of error, nevertheless the cause is already in this Court.

It is true, as alleged in the brief of the Messrs. Parker and Mr. Hackett that no supersedeas has been given, but I respectfully submit that none was necessary.

The money is in the Treasury and cannot be withdrawn. No greater security could be given to the defendants in error than that fact, and as no execution can issue under this decree, no supersedeas ought to be required. The plaintiffs in error are poor, and would be unable to give a bond in double the amount of the moneys in the Treasury, nor can I believe the court would require it.

If this writ be dismissed, or this decree affirmed, we will have the anomalous position of moneys in the Treasury which the plaintiffs in error are enjoined from collecting, and which the defendants in error are by law prevented from collecting, and the matter of to whom it shall be paid will become one dependent upon the discretion of the disbursing officer, and to him will be given a power of disposition and discretion forbidden by the statute to the Court.

If the Court should be of opinion that an error has been made in the selection of the Judge to whom application should be made for the allowance of the writ, then I respectfully submit that the Court, after this argument, should either allow the writ or give the plaintiff in error a new writ, and permit the matter to go to final hearing, and that there is neither justice nor right in compelling the plaintiffs in error to suffer for an error in construction of an ambiguous statute, about the meaning of which even the justices of this court differed in the case of Bartemeyer vs. Iowa above cited.

I respectfully submit that the motion in both its branches should be denied with costs.

Frank McGee.

No. 105.

Supreme Court of the U. S.

Brief of McGee for P. E.

OCTOBER TERM, 1898.—No. 105.

Filed Nov. 10, 1898.

RODMAN M. PRICE, MADELINE PRICE, GOVENEUR PRICE, FRANCIS PRICE, AND E. TRENCHARD PRICE, Plaintiffs in Error, *vs.* ANNA M. FOREST AND CHARLES BORCHERLING, Defendants in Error.	In Error to the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF FLAVEL McGEE FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This cause was a suit in equity, brought in the Court of Chancery of New Jersey, wherein the defendants in error were complainants, and the plaintiffs in error were defendants, and was for revivor and relief.

(Case, pages 11 to 23.)

The original bill alleged a recovery against said Rodman M. Price by said Samuel Forrest of seventeen thousand dollars, and seventy-eight dollars and four cents costs, the issue of execution thereon, its return unsatisfied, the death of Forrest on the seventh of November, eighteen hundred and sixty, the granting of letters of administration to the complainant, Anna M. Forrest, the procurement by her of a writ of scire facias to obtain execution of said judgment against

Price, a judgment for such execution, and its issue on the fourteenth of April, eighteen hundred and seventy-four.

Allegations in said bill of the possession by Price of a claim for moneys upon a judgment against Erasmus B. Keyes and Edmund Scott, and other equitable rights; and that said original bill prayed an injunction against the collection by price of any of these moneys, or his sale or disposition of any lands or other property.

It further recites an answer to that bill on the fourth of December, eighteen hundred and seventy-four, by Rodman M. Price, his wife Matilda C. S. Price, and Francis Price, admitting the recovery of the judgment by Forrest, and alleging the ownership of the Forrest judgment by said Keyes, and that Keyes had written to him years before Forrest recovered the judgment against Price that he had paid Forrest the whole of the claim on which the Forrest judgment was founded; that Keyes had a large amount of the assets of the defendant Rodman M. Price, and that at the time of the said Forrest bringing his suit said Rodman M. Price had already sued Keyes for the money recovered in the name of said Price, in and by said judgment against Keyes in the State of New York; and that by reason of hostile relations between Keyes and Price the latter was unable to establish the payment of the claim of Forrest, and was obliged to let Forrest's suit go by default, and insisting that said Keyes, by his letters, was estopped from alleging that there was nothing due on the Forrest judgment, and that the other defendants believed the statements of Rodman M. Price to be true.

That said Answer further alleged that the lands on which execution was sought to be obtained, although they stood in the name of Rodman M. Price, were, in equity, the property of his father, the said Francis Price, and were bought by him for the benefit of the children of the said Rodman M. Price, but denied that he, Rodman M. Price, had any interest therein.

That said original bill further alleged that after the filing of said answer the said cause slept until about the ninth of August, eighteen hundred and ninety-two, when the complainant, Anna M. Forrest, filed therein a petition, in which she stated that since the filing of the bill of complaint in the cause no payment had been made upon the judgment therein mentioned, nor had she or her solicitors been able to find any property of Price out of which to make the amount of her judgment, and that the whole thereof remained due, and that the execution was unsatisfied. That on the fourth day of August, eighteen hundred and ninety-two, she caused another writ of execution to be issued to the Sheriff of Bergen, which was also returned unsatisfied; and that she stated further in said petition that it had lately come to the knowledge of her solicitors that the sum of about forty-five thousand dollars was about to be paid to said Rodman M. Price by the officers of the Department of the Treasury of the United States,—being the sum found to be due him from the Government of the United States by an accounting lately had between him and it. That said sum was to be paid by the delivery to said Price, or to his attorneys, of a draft of the Treasurer of the United States or some other negotiable security made or issued by its financial officers, and drawn payable to his, the said Price's own order, the rules of the Department of the Treasury forbidding it being made payable to any other person, or that said sum should be paid in any other way, and that said draft or negotiable security was to be made, and the transaction closed, on the Fifteenth of the then month of August. And further showed that Price had always exhibited great unwillingness to satisfy any part of said judgment. And further that in said Petition she believed that Price would, if he obtained the said money coming from the United States to him, at once take means to put the same beyond the reach of the Complainant, unless restrained by an order of said Court; and she prayed an injunction out of said Court, directed to said Price,

restraining and forbidding him from making any endorsement of such draft or any draft or other negotiable security of the United States which should come to his hands or the hands of any other person, or any money derived therefrom or thereby, to any person whatever, except the complainant or her Attorneys, until the further order of the Court; and that a Receiver might be appointed of said draft or other negotiable security; and that Price might be ordered and directed immediately on receipt of said draft or negotiable security to endorse the same to said Receiver, to the end that the amount thereof might be received by him as an officer of said Court of Chancery, and disposed of according to law, and such directions as should be therein made.

That upon the presentation of said Petition and affidavits sustaining it, a rule to show cause was made returnable on the twelfth of September, eighteen hundred and ninety-two, why the prayer of the Petition should not be granted and an injunction issue, and a Receiver be appointed, pursuant to the prayer of the Petition, and with an intermediate restraint upon said Price from making any endorsement of any such draft of the United States as mentioned in the Petition.

That a copy of said order was duly served upon said Price on the tenth day of August, eighteen hundred and ninety-two, and that about the fifth of September of that year said Price received from the Assistant Treasurer of the United States four several drafts signed by such Assistant Treasurer, and dated September fifth, for the following sums respectively: one for $2704.08, another for $13,500,00, a third for $20,000,00 and a fourth for $9,000,00; and that at various days in the said month of September, and in the month of October next following, naming the dates said Price endorsed said drafts, and himself received the money on them all, and applied it to his own use; and that on the third day of said October, the day on which he received the last of said moneys, he filed an answer to said Petition, stating that the judg-

ent of said Forrest and the complainant against him was paid, and that there was a sum of money due to him from the United States, voted to him or his heirs, by Congress, and that about forty-five thousand dollars was to be paid, but that said money was not amenable to complainant's claim even if valid, nor could it be lawfully paid to any receiver.

That said original bill further recited that on the tenth of October, eighteen hundred and ninety-two said Borcherling was appointed by the Court of Chancery Receiver of the property and things in action belonging to, or due to, or held in trust for said Price at the time of issuing said execution as thereinabove mentioned or at any time afterwards, and especially of said drafts, with authority to possess, receive, and it may be in his own name as such receiver, sue for the same, and that it was thereby made the duty of said Receiver to hold the said drafts subject to the further order of the Chancellor, and further that the defendant Price was thereby ordered to convey and deliver to the said Receiver all such property and things in action, and the evidence thereof, and especially forthwith to endorse and deliver the said drafts respectively, and each of them, to the said Receiver; and that Price, and all agents or attorneys of his were enjoined from intermeddling with the Receiver in regard to the drafts, and ordered and directed, if in possession or control thereof, to make delivery to him of the same, and to do all things necessary which should be in their power to put the Receiver in possession and control thereof, with this proviso: that if the drafts, excepting the draft for $13,500,00, should be delivered, with the endorsement of the defendant, to the clerk of the Court, the proceeds to be deposited to the credit of the cause, on or before the thirteenth day of October then instant, the order was to be void, and enjoining Price from any other endorsement than that.

That the said drafts were not delivered, and the order remained in force.

That the Receiver complied with the orders of the Court, by filing bond and otherwise. That he served upon Price copies of the order, and made demands for the drafts. That the service of the order was not made, nor said demands, until about the twenty-second of July, eighteen hundred and ninety-three, because said Price was not to be found within the State of New Jersey, but that notice thereof was given to him elsewhere shortly after the date thereof; and that on or about day of eighteen hundred and ninety-two (the day and the month being left blank) an attachment was issued by the Court of Chancery, against Price, for contempt of Court and disobedience of the order.

It then alleges proceedings under said Attachment; the conviction of Price thereof, and an order for his imprisonment in jail unless he comply with the order within five days.

That said forty-five thousand dollars, or thereabouts, the amount of said four drafts, was part of a certain debt of seventy-six thousand dollars, or thereabouts, awarded to said Rodman M. Price by the officers of the Treasury Department of the United States, under an Act of Congress of the United States, passed February 23, 1891, and agreed to be paid to him, in conformity with the directions contained in said Act, by said officers. That drafts for only the said four amounts were drawn and given to Price on account of said debt of seventy-six thousand dollars aforesaid, the officers at first believing that there was a counterclaim on the part of the United States for a debt due by Price to the Government, but afterwards, and on or about the day of Eighteen hundred and ninety-two, it was made known to the representatives of the Treasury Department to the contrary, and the Treasury Department had reconsidered its former determination and was about to pay Price the balance of about thirty-one thousand dollars, and that Price and his agents were actively seeking to obtain payment of the same; and that there-

upon, upon proof made to the Court of Chancery of the demands aforesaid, and the refusal of said Price, another order was made by the Court of Chancery on the eighteenth day of May, Eighteen hundred and ninety-four, directing Price to execute two instruments in writing, which before that time he had been required by the Court to sign, seal and deliver—one of them consenting that the balance of said money due to him by the United States should be paid by it and by its treasury department unto the Complainant Charles Borcherling, Receiver, as aforesaid, which consent should be filed with the said Treasurer, and the other of said instruments being an assignment in writing, under his seal, proposed to be made by him of all his property, real and personal, whatsoever and wheresoever, and of all rights and credits to him belonging.

That at the time of service upon him of duly certified copies of said orders respectively, said Rodman M. Price was sick, but of sound mind, and capable physically, of obeying the same; and that after such service, and on or about the eighth of June, Eighteen hundred and ninety-four, he died at his residence in Bergen County, New Jersey.

The Bill further alleges that no letters of administration have been granted upon his estate, and that he died without any enforcement of the order, and without having paid the money, and without having executed the papers above mentioned.

That by reason of the premises the complainants are frustrated and are driven to apply to the Court, and as to the balance of the money in the hands of the Treasurer, they are without remedy; that the officers of the Treasury are, nevertheless, willing to do justice, and neither agree nor refuse to pay the money to the said Borcherling, Receiver, but await the determination of a lawful tribunal of the right of the Receiver; and that the complainants believe that on the decree of the Court of Chancery of New Jersey, that the Receiver is entitled to the balance, and notice thereof

given to the Secretary of the Treasury, said decree will be respected and the balance handed over.

The Bill further alleges that on the ninth day of June, Eighteen hundred and ninety-four, the day after the death of the said Rodman M. Price, these plaintiffs in error, the defendants in said suit, executed a power or powers of attorney, to John C. Fay, of Washington City, counselor-at-law and attorney in his lifetime for said Rodman M. Price deceased, in litigation in respect to drafts, and thereby authorized said Fay to apply to the Secretary of the Treasury to pay to them the balance standing to the credit of said Rodman M. Price, and that they were at that time pressing their claim with the Secretary of the Treasury, insisting that by the true construction of said Act of February 23rd, 1891, said balance of said moneys standing to the credit of said Price, deceased, belonged to them as his heirs-at-law, and that the complainant Receiver had no right in the law thereto. That the Treasury Department, acting under said Act, has credited the said Rodman M. Price upon its books with the sum of about seventy-six thousand dollars as being due to him, and has already paid him the said four drafts and over nine thousand dollars more, thereby reducing the balance apparent of said books to the sum of about twenty-three thousand dollars.

That under a proper construction of said act, and by force of said receivership and the laws of New Jersey, Price's right to all the balance of the moneys passed to the complainant, the said Receiver, and still remains in him; and that in the true construction of the words in said act directing payment to said Price and his heirs, the words "to his heirs" are simply words importing that the moneys be awarded and paid to the legal representatives of said Price in case before such award he had departed this life; that the said receivership having worked a legal assignment by said Price to the Reciver, he is to be held in law as having received said moneys and having made assignment thereof unto the said Receiver.

That there is no right in said children of said Price to make the demands aforesaid; that the contention that they have such right had already been argued before the Court of Chancery and decided against them, and that the action of the children in demanding the balance of the moneys, is in fraud of the Orders of the Court of Chancery; that they had knowledge of said orders, and that the attorney, John C. Fay, also had; and that the application to the Secretary of the Treasury is by way of conspiracy among all the parties including their said attorney Fay.

The bill further refutes the allegation as to the title to said moneys in said Borcherling, and insists that the disposition of the money and adjudication of the writ belongs, in law and equity, to the Court of Chancery of New Jersey; that the children of said Price ought to come to the Court of Chancery and not to the Secretary of the Treasury; and that letters of administration *ad prosequendum* have been granted unto Allan L. McDermott, and that he is thereby made defendant to the bill.

The bill then prays a revival of the original bill, and injunction against the defendants, the present plaintiffs in error, restraining them from making any demand or application to the government of the United States, or the Secretary of the Treasury, or any officer thereof, or from receiving from the United States, or any of its officers, any part of the money still there.

That they be decreed to pay the moneys to the said Charles Borcherling, Receiver, to be by him disposed of under the orders of the Court of Chancery; and that the administrator *ad prosequendum*, or any other administrator or executor, thereafter to be appointed, of Rodman M. Price, may answer, and for other and further relief.

No process seems to have been issued against the said Allan L. McDermott, nor does any further notice appear to have been taken of him in any of the proceedings.

To this bill of complaint the defendants, these plain-

tiffs in error, filed pleas (pages 25 to 37 inclusive) alleging the death of Rodman M. Price on June seventh, eighteen hundred and ninety-four, intestate, leaving his widow and the above named plaintiffs in error, the defendants therein, his heirs at law. That he was not seized at the time of his death of any real estate and that no lands, tenements or hereditaments descended to them or either of them from him, nor were any devised to them or either of them by him. That he had at his death no personal estate or property whatever as they believe, and that neither of them has or hath the possession, ownership or control of any personal estate whatever from their father, the said Rodman M. Price, or any knowledge of the existence anywhere of any such estate. That they had none of them received any moneys from the government of the United States either through their said father, or otherwise, under or by virtue of the act of Congress referred to in the bill of complaint, which act was approved by the President, February 23d, 1891, and of which a copy therein was set out in these words (page 25).

"An act for the relief of Rodman M. Price."

"Be it enacted by the Senate and House of Repre-
"sentatives of the United States of America in Con-
"gress assembled, That the Secretary of the Treasury
"of the United States be and he is hereby authorized
"and directed to adjust upon principles of equity and
"justice the accounts of Rodman M. Price, late purser
"in the United States Navy, and acting navy agent at
"San Francisco, California, crediting him with the sum
'paid over to and receipted for by his successor, A.
"M. Van Nostraud, acting purser, January fourteenth,
"eighteen hundred and fifty, and pay to said Rodman
"M. Price, or his heirs, out of any money in the Treas-
"ury not otherwise appropriated, any sum that may
"be found due him upon such adjustment.

"Approved February 23, 1891."

Alleging that as to all moneys not actually received by said Rodman M. Price in his lifetime from the Government upon such adjustment under said

Act, his heirs were entitled to the same thereunder by special designation in said Act as his heirs, and that the said moneys so remaining unpaid are not in any wise chargeable with the debts and liabilities of said Rodman M. Price or to any of his creditors, and that all such moneys so unpaid to said Price in his lifetime are payable by the Government directly and exclusively to these defendants, the heirs of said Price, deceased, out of any money in the Treasury not otherwise appropriated, and for the benefit of said heirs respectfully, without any claim whatsoever upon the same by the complainant. And that the balance unpaid as aforesaid to Price in his lifetime, and to which the defendants are entitled as aforesaid, which balance the defendant stated to be about twenty-three thousand dollars, is part of the sum referred to in said Act as paid for and receipted for by Van Nostrand, acting purser, January fourteenth, eighteen hundred and fifty. The plea then sets out in detail the history of the transaction, in brief as follows:

That in 1848 Price was assigned to duty upon the Pacific Coast, at California, as purser and fiscal agent of the Government, and acted as such up to December, eighteen hundred and forty-nine, when he was detached by the Government and ordered to transfer all public moneys to his successor or such other disbursing officer as might be designated, and to report at Washington for the purpose of settling his accounts. That in December, eighteen hundred and forty-nine Van Nostrand became such successor and on December thirty-first of that year, Commodore Jones on behalf of the Government, directed Van Nostrand to call on Price and receive from him all books, papers, funds, &c., belonging to the purser's department of San Francisco. That in accordance therewith Price on that day paid to Van Nostrand all the public moneys in his hands and afterwards, and on the fourteenth of January, eighteen hundred and fifty, Price, out of his private moneys and not of the

Government funds, advanced to Van Nostrand seventy-five thousand dollars and took his receipt therefor in these words:

"San Francisco, January 14th, 1850.

"Received from Rodman M. Price, purser, U. S. "Navy, seventy-five thousand dollars, for which I "hold myself responsible to the United States Treas- "ury Department. $75,000.

"A. M. VAN NOSTRAND,
"Acting Purser."

(See page 27.)

That this advance was without the approval and signature of Commodore Jones, his commanding officer, although Price regarded the advance as an accommodation to the Government.

That Van Nostrand failed to account for this money to the Government and never returned it to Rodman M. Price, but appropriated it to his own use. That in settlement of his accounts with the Government this seventy-five thousand dollar loan was dealt with as made without authority. That the matter was referred to Attorney General Caleb Cushing, who gave an opinion dated March 12th; 1854, that the Government was not liable. A copy of this opinion was annexed to the pleas and will be found on pages 29 to 36 of the case.

That afterwards, and in 1891, the Act above referred to was passed, and under it the sum of $76,204.08 was found to be due to Price. That Price in his lifetime received part thereof as aforesaid and to the balance, the defendants as heirs were entitled under the Act.

The bill alleges that the claim was not a lawful claim, for which the Government was lawfully liable, but in view of the fact that the money had been paid or advanced by said Rodman M. Price, deceased, in the belief that it would be an accommodation to

the Government, in the condition of affairs that existed in the early history of California at that time, and in view of the fact that said Price had become old and been in the service of the Government, and purser in the Navy for many years, and also Governor of the State of New Jersey, and that it was equitable and just, apart from the question of the lawfulness of the claim, that he or his heirs mentioned in said Act of Congress should be paid the sum of seventy-five thousand dollars, the Act had been passed and thereunder the adjustment made as above stated.

The plea, after an averment of the truth of these allegations prayed judgment whether they ought to be obliged to answer the bill, and prayed to be dismissed with costs.

An inspection of the opinion of Attorney General Cushing will disclose that after a recitation of the facts he advised that the receipt from Mr. Price of the public money above mentioned by Mr. Van Nostrand was lawful, and the Government liable therefor, but that as to the other moneys paid Mr. Price to Mr. Van Nostrand, they were undoubtedly the private funds of Mr. Price, and that the Government was not responsible for and could not be charged therewith.

On these pleadings the matter was heard before the Chancellor and the suggestions hereinafter stated as having been made to the Court of Errors and Appeals were there made, with the result that the Chancellor, by order dated the 29th of July, 1895, ordered that the pleas be overruled, with costs. (Case, page 37).

From this decree the defendants below, the plaintiffs in error here, appealed to the Court of Errors and Appeals, alleging generally in accordance with the practice in New Jersey as their grievances, the order overruling the pleas with costs and directing them to answer, plead, or demur anew, whereas as they alleged, the order should have been that the pleas do stand, with costs. (See page 38.)

After argument in the Court of Errors the decree below was affirmed. (See pages 39 and 40.)

And in the decree the reason for the sustaining of the decision was given in the following words: "For that the Act for the relief of Rodman M. Price, passed by the Congress of the United States and approved by the President on the twenty-third day of February, eighteen hundred and ninety-one, and set forth in said pleas and each of them did not entitle the defendants below, appellants in this court, though being and claiming as his heirs at law to the payment unto them of the said sum of money mentioned in the said bill of complaint and in said pleas, actually remaining unpaid by the Treasurer of the United States to the said Rodman M. Price at his death, but that said moneys so remaining unpaid are payable to the said Charles A. Borcherling, appointed Receiver in the life of said Rodman M. Price, deceased, as stated in said bill of complaint of the property and things in action belonging to or held in trust for said Rodman M. Price at the date of said order appointing said Borcherling R c iver, mentioned and at the previous time therein mentioned." (See page 40.)

And this decree, by a decree of the Chancellor upon remittitur, was on the nineteenth of June, 1896, made the decree of the Court below. (See page 40).

The opinion of the Court of Errors and Appeals in this cause will be found on pages 52 to 57 of the case, and deals very elaborately with the whole question, and so far as is applicable to the facts of the case embraced in the assignment of error is sufficiently set forth on the syllabus thereto, which will be found on pages 52 and 53, from which it will be seen that the Court held that the Act of Congress pleaded was not the bestowal of a mere gratuity, but the restitution of property which once belonged to him as assets for the liquidation of his pecuniary obligations, and upon its restoration cannot be held to have assumed any new character. That the words, "or his heirs," are simply words of succession and descriptive of his estate in the money found to be due him and used in the statute in the sense of personal representatives, and

intended to secure the moneys to his estate in the event of his death before they were paid.

That the assignment of a claim against the United States ordered by the Court of Chancery to be made by a debtor or his representatives, if he be deceased, to a receiver in aid of proceedings in said Court by a creditor in order to obtain satisfaction of a judgment at law against the debtor is not prohibited by and is not a nullity under the provisions of section 3477 of the Revised Statutes of the United States.

3. That such an assignment to the receiver and assignments to him by operation of law in such proceedings, is an exception to the provisions of section 3477 of the Revised Statutes of the United States requiring assignments of such claims or powers or attorneys to receive the same, to be acknowledged by the persons executing them and to be certified by the officer taking such acknowledgements.

4. That the objects of section 3477 of the Revised Statutes of the United States are that the Government may not be harrassed by multiplying the number of persons with whom it has to deal, and that it might always know with whom it was dealing until the contract is completed and an adjustment and settlement made, and that none of these evils can happen upon an assignment for the benefit of the creditors of a claimant, either expressly ordered to be made by a court having jurisdiction, or resulting by operation of law; and

5. That the Court of Chancery has jurisdiction to determine the right of the distribution of such claim in payment and satisfaction of a judgment debt due from the claimant to his creditors whenever the proper parties are before the court and the point decided be within the issue made by the pleadings.

It will be seen from an inspection of the text of the

opinion that a proper construction of both the Acts of Congress therein referred to, was the principal point of discussion in the cause.

In addition to this question, there were two or three contentions made that were not insisted upon in the subsequent proceedings and do not appear before this Court, all of which, however, were decided adversely to the present Plaintiffs in Error. Namely, that the Receiver appointed by the Court of Chancery had no standing to demand the moneys.

That if the word "heirs" in the act was not to be construed in its technical meaning, but to be construed as next of kin or legal representatives, then they were not proper parties to the suit, as action for moneys of a decedent in the hands of next of kin could be brought only by the Administrator.

That these moneys, if personal estate of the deceased, were not assets, and that therefore these defendants could not be pursued as heirs, by creditors, if the property came to them in any other than their individual capacity.

That there was no debt owing by the defendants to the Complainants.

As has been stated, all these contentions were ruled against the plaintiffs in error, in the Court below and are not before this Court at present and are specified only that the Court may be informed of the history of the litigation.

In accordance with the Statute of the State of New Jersey, General Statutes of New Jersey, Vol. 1 p. 406. Section 176, of the Chancery Act, namely: "That if "the plea or demurrer be overruled, no other plea or "demurrer shall "be thereafter received, but in such "case the defendant shall file his answer to the com- "plainant's bill in twenty days after such overruling, "and if he fail to do so, the said bill shall be taken as "confessed, and the said Court shall thereupon pro- "ceed as directed in the twenty-eighth section of this "act" which twenty-eighth section provides for the filing of pleadings in a cause in regular sequence within the

time then named. The defendants filed their answer to the said Bill of Complaint in which they alleged that they were the only children and next of kin and heirs at Law of said Rodman M. Price, deceased. They admitted the truth of the allegations of the bill in so far as it recited the contents of the original bill and the proceedings thereon had. They denied knowledge as to the reception by said Price, of the money's alleged to have been received by him in his lifetime, admitted that the amounts claimed had been drawn from the Treasury, but alleged a lack of knowledge as to whether they had been received by Rodman M. Price or not, and denied the reception of any part thereof by themselves. They also admitted Rodman M. Price's refusal to comply with the demands of the Receiver, the taking of the proceedings against him for contempt, the judgment of contempt, his illness and his death at the dates named in the bill, without the order having been executed.

They admitted that no Will had been presented and alleged that none was left by him so far as they knew, or had reason to believe, admitted that no letters of administration upon his estate had been issued, alleged that he left no estate so far as they knew or had reason to believe, that nothing had ever come to them, that no property, either real or personal, had ever come to them, or any of them from his estate and that there was no property of his estate to come to them of which they were aware.

They admitted the allegations of the bill that the complainants were without a remedy for the recovery of the money alleged by them to be due from the decedent, if any such were due, and denied their right by any proceeding in that Court to sequester the money in the Treasury of the United States for the reasons thereinafter stated.

As to what was the disposition of the Treasury Department, or whether demand had been made upon them as alleged in the bill, they alleged that they had no knowledge.

They admitted executing, after the death of Rodman M. Price, a power of attorney to John C. Fay, for the purpose of collecting for them the moneys in the Treasury, asserted their right to do so by law, charged that they were then entitled to receive from the Treasury the moneys there remaining, and that they were parcel of the moneys awarded by the Act of Congress set forth in the Bill of Complaint, alleged that at the death of said Rodman M. Price, they became entitled under the act of Congress, set forth in the bill and thereinafter referred to, to all the moneys then remaining in the Treasury as original takers, and that they were advised and charged that there was no jurisdiction in the Court of Chancery to sequester the moneys remaining in the Treasury and awarded under the Act, and that the only persons to whom the same could be legally paid, were these defendants or such persons as might hold an assignment thereof, freely made by them in accordance with, and having all the formalities required by the Laws of the United States.

They denied that the appointment of the Receiver, and the order appointing him, worked a legal assignment by the decedent to the complainant, (Borcherling) or conveyed to him any of the rights of any of the takers, under said Act of Congress.

They admitted the allegations of the bill as to their contention on the argument of the original case, and alleged that it was correct.

They denied the allegations of the bill that they had knowledge of the action of the Court and the orders thereof in the original cause, or that any of them were made known to them other than that they had knowledge of the proceedings in a general way, but that they had any specific knowledge with reference thereto or what orders were being made, or anything other than a general knowledge that a suit was being prosecuted against their father to recover these moneys they denied, and alleged that their action after his death was taken by reason of their belief in their

rights as original takers under said Act of Congress, and alleged that they were advised, and there charged that that was their right.

They denied that their action was in disobedience of the orders of the Court or that they were bound thereby, or that they were in contempt.

They then alleged the facts of the case, setting out the facts substantially as recited in the plea and as herein above recited, and also the Act of February 23rd, 1891, above referred to in extenso, which, for the sake of conciseness I take the liberty of not repeating, but refer the Court to the previous recitation thereof herein, and prayed to be dismissed with their costs.

Annexed to the Bill was a copy of the opinion of Attorney General Cushing, a copy of which is heretofore referred to.

The cause was almost immediately heard on Bill and Answer and a decree therein was made by the Chancellor bearing date the 25th of June, 1896, but not filed until the thirtieth of August of that year, in which the Chancellor decreed in these words:

"That the said defendants and each of them be "and they hereby are perpetually enjoined and re- "strained from making any demand upon, or applica- "tion to the Government of the United States, or the "Secretary of the Treasury of the United States, or any "officer of the said Treasury, or from receiving "from the United States, or its said Secretary of the "Treasury or any officer thereof any part of the money "remaining in the Treasury of the United States at the "time of filing said Bill of Complaint, and which was "awarded to Rodman M. Price, deceased, as in the said "Bill stated or now there remaining, and that the de- "fendants likewise pay to the plaintiffs or their solici- "tors their costs to be taxed in the cause." Page 48.

The decree being, as the Court will perceive an injunction against any application to the Government for the money or receiving the same from the Government and not a decree adjudicating the rights of

either party thereto, or in anywise determining those rights, in short, tying up the money so that the defendants could not apply for or receive it, while at the same time giving the Complainants no decree for its possession.

Under date of November 2nd, of the last named year, the defendants appealed from this final decree to the Court of Errors and Appeals. (Page 49). The Petition of Appeal in which will be found on the same page, and the Complainants answer thereto on Page 50.

The matter was presented to the Court of Errors at the November Term and a decision was handed down under date of January 11th, 1897, affirming the final decree of the chancellor. (Page 51.)

The opinion of the Court, however, was not filed until the 22nd of April, 1897. (Page 67.)

That opinion was very short, and was in these words:

"This appeal from the final decree of the Court of Chancery in this cause brings up for decision the rights of the parties under the Act of Congress set out in the pleadings, and under Section 3477 of the Revised Statute of the United States. These questions having been passed upon in the opinion of this Court on the appeal from the decree of the Chancellor overruling the Pleas of the Defendants in this cause, (35 Atlantic Rep. 1075) the decree now appeared from the reasons there given must be affirmed, with costs. (Page 67).

The opinion of the Court there referred to will be found upon pages 52 to 67 of the case. By a comparison of the dates, the Court will perceive that the opinion overruling the pleas was not filed until late in the November Term, at which the appeal from the final decree was argued, which accounts for the fact that the two opinions are printed together, apparently out of place in the book, but really in the order of the sequence of their dates.

The Court also will perceive by the language of

these two opinions that the question upon which the Court below founded its conclusion was the construction to be given to the two acts of congress therein referred to, and that the local matters raised on the hearing of the pleas, in addition to the federal questions, were not considered in the second opinion, nor necessary to a decision of the case adversely to the plaintiffs in error.

On that opinion a decree was filed on January 11th, 1897, confirming the decree of the Chancellor and from that decree the appeal now before the Court has been taken.

The question before the Court for decision is, therefore, whether the decree of the Chancellor which was affirmed by the Court of Errors and Appeals is erroneous, and it is alleged by the plaintiffs in error that it is erroneous.

First. Because the requirements of Section 3477 of the revised statutes of the United States which are conditions precedent to a valid assignment of the claim in question against the government had never been complied with either by Rodman M. Price in his lifetime or the complainants since his death, in that:

(1) No assignment thereof was freely made.

(2) No warrant for the payment thereof had been issued.

(3) That the assignment ordered against Rodman M. Price did not fall within any exceptions to the rules set up in the statute, namely, assignments in bankruptcy and insolvency, nor assignments by operation of law.

Second That under the act of Congress of February 23d, 1891, the plaintiffs in error, as heirs of Rodman M. Price, were under that act original takers.

Third. That the decree appealed from restrained the plaintiffs in error from the assertion of a right against the government without adjudicating against

that right or conferring it upon the defendants in error.

That the Court of Errors and Appeals is the Court of last resort in New Jersery. See the Constitution of New Jersey, Article VI, Judiciary Section 1. General Statutes of New Jersey, Vol. 1, p. lviii. "1 The judicial power shall be vested in a Court of Errors and "Appeals in the last resort in all causes as heretofore," * * *

SPECIFICATION OF THE ERRORS RELIED UPON.

The plaintiffs in error rely upon all the errors set out in their assignment of errors, (pages 7 to 10) namely:

1. That the decree of the Chancellor (page 48) was affirmed with costs.

2. That the plaintiffs in error were by said decree enjoined from applying to the government, the Secretary of the Treasury, or any officer of the Treasury for the moneys mentioned in the pleadings and from receiving the same or any part thereof.

3. That costs were decreed against the plaintiffs in error.

4. That by said decree it was decided that under the act of Congress of February 23d, 1891, hereinabove set forth, the money therein mentioned was intended to benefit the estate of Rodman M. Price, and to be within the reach of his creditors, and that the heirs of said Rodman M. Price, deceased, were not thereby personally intended to be beneficiaries of the United States by way of gift or gratuity to them as such.

5. That it was by said decree adjudicated that these plaintiffs in error, the heirs of said Rodman M. Price, deceased, were subject to the jurisdiction of the Court of Chancery of New Jersey, in the premises and that that Court could treat them as if they were in possession of the moneys in question in order to compel them to assign it to a Receiver appointed in said suit, or to give effect to such assignment to him by operation of law.

6. That it was in said decree decided that an assignment of the claim of the plaintiffs in error to said moneys made by the decree of said Court against the will of the plaintiffs in error ~~could~~ and, without the formalities required by Section 3477 of the revised statutes of the United States, ~~as aforesaid~~ as valid.

7. That by said decree it was decided that the said Receiver took title to said moneys from said Rodman M. Price deceased, or these plaintiffs in error, by operation of law, and that the title of said Rodman M. Price deceased, or of these plantiffs in error was vested in said Receiver by operation of law,

8. That it was by said decree decided that a transfer of said moneys made to said Receiver against the will of the plaintiffs in errors and without the formalities required by section 3477 of the revised statutes of the United States was a transfer made by operation of law and valid.

9. That in said suit these plaintiffs in error in their pleadings in said cause claimed that under the act of Congress of February twenty-third, eighteen hundred and ninety-one, therein recited, they were entitled to the balance of the said moneys in the Treasury of the United States therein mentioned, as original takers under said act, and said decree adjudicated that they were not such original takers under said act.

10. That these plaintiffs in error in the pleadings in said cause specifically set up a claim under said act last above referred to to a right to receive the moneys therein mentioned from the United States and said decision was against said right so specifically set up and claimed.

11. That in said suit these plaintiffs in error in their pleadings specifically set up and claimed that

under Section 3477 of the revised statutes of the United States no transfer or assignment of said claim for said moneys upon the United States or any part thereof could be validly ordered by said Court against their will, nor without the formalities mentioned in said Section 3477 of the revised statutes of the United States, and said decree decided against said right so specifically set up and claimed by them.

BRIEF FOR ARGUMENT.

From the foregoing statement of the case and specification of errors it will be observed that the case to be adjudicated on this appeal is briefly as follows: The original bill against Price was a creditor's bill which dealt with matters other than the questions now at issue, which questions were first imported into it by the petition mentioned in the bill of revivor in which, amongst other things, the fact of these moneys having been awarded to Governor Price under the act of February 23rd, 1891, was first alleged.

The result of this litigation against Governor Price was the adjudication by the Court of Chancery appointing the said Borcherling, Receiver, directing an assignment by Governor Price, to the Receiver of the drafts then issued and on his subsequent refusal to obey the said orders, granting against him a judgment of contempt of Court for such disobedience. Pending this litigation Governor Price died and the Court will perceive that there was never, so far as the case shows, and as I understand to be the case any final decree made in that cause.

Upon his death, however, the present bill was filed for a revivor of the original suit and for affirmative relief against the defendants, and it is in this case for the first time that any final decree appears to have been made.

It appearing in the case, as it does by the pleadings, (page 44) that these defendants are the heirs of Governor Price, but that they have no assets from him

whatever and are not themselves indebted to the complainants and have no possession, ownership or control of any personal estate from him nor any assets from him by devise, or otherwise, two questions arise on the threshold of the case.

First—As to the power of the Court of Chancery to make a decree at all enjoining the defendants, these plaintiffs in error, in the absence of an adjudication as to the right of the matter, from applying for or receiving from the Government the moneys in question, and

Second—The power of the Court to dispose of these particular moneys in view of the terms of the two acts of Congress above stated.

With reference to the first of these questions it may be urged that that is a question of State jurisdiction and is set at rest so far as this Court is concerned by the adjudication of the State Court. This proposition seems to me to be erroneous, and without arguing it extensively I make the following suggestion, namely,

That so far as these plaintiffs in error are concerned the order for an assignment of the moneys in question was made in an interlocutory proceeding to which they were not parties, with reference to which they were not heard and as to which, not having assets, they cannot be bound as heirs and therefore that that order has no binding effect upon them, and further that there having been no such decree made against them in the original case, there is an equal lack of decree on that subject in the case at bar, and that there is no adjudication on that subject to which they are parties, or by which they are or can be bound.

That the order under which the sequestration is claimed to have been wrought was an order personal to Rodman M. Price, deceased, that it was never obeyed, nor any proceedings taken which, if valid, would carry it into effect, or operate to transfer any title, that at his death no transfer of any title binding upon any other than the parties to that suit was in

existence, and that these plaintiffs in error came into the litigation unaffected by any orders made in the original suit, and that no decree having been made against them in this suit adjudicating the right of the matter against them, a decree enjoining them from claiming the moneys cannot be anything more than brutum fulmen, and is and must be void and of no effect. Nor can it be said that this proposition fails to present a Federal question for the reason that the moneys are moneys in the hands of the Government of the United States, granted under an act of Congress, and their disposition must be of necessity a question over which the courts of the United States are vested with jurisdiction in the last resort, and I respectfully contend, therefore, that for that reason the decree directing the injunction was erroneous, and in such particulars as give to this Court jurisdiction to decree.

With reference to the second proposition, this Court has already on the motion to dismiss this appeal determined that a Federal question was involved, and I therefore will not take the time of the Court in discussing that branch of the proposition further than to refer the Court to the previous decision filed on the conclusion of the Court then read.

The rights of the plaintiffs in error under the acts of Congress above cited.

The decree appealed from starts out with the recitation that the Court is of opinion that the complainants are entitled to the relief prayed in so far as it relates to the collection by the defendants of the moneys mentioned in the bill of complaint and still in the Treasury of the United States and then decrees the injunction above referred to.

While, therefore, the decree fails to make any adjudication of the rights of the parties it will be assumed, I presume, by the Court that it did so for the reasons mentioned in the opinion of the Court of Errors on the argument of the appeal from the decree overruling the pleas, and I therefore address myself

to the discussion of the question therein involved, for unless the Court is held to have based its decree on that reasoning it must be that under the elementary principle, that a court has no jurisdiction to make an order which cannot be executed, the decree must be reversed.

As will be seen from the pleadings the corpus of the claim in suit is a claim against the United States which is not only upwards of forty years of age, and the original bill in which was filed on the thirtieth of May, eighteen hundred and seventy-four, or upwards of twenty years after the alleged debt from the Government to Governor Price arose, and therefore many years outlawed, but was also a claim which had never been prosecuted in the Court of claims and which, by the opinion of the Attorney General of the United States, delivered as early as the year eighteen hundred and fifty-four, was held to be one for which the Government was not responsible and for which it could not be charged, and which, therefore, had its inception in the act of February 23rd, 1891, and was, and of necessity must be, a gratuity from the United States.

It would seem, therefore, to be plain that this claim must be bound and limited by the terms of the act creating it, and be governed by the principles of the Federal law in force.

A glance at the Act of November 23rd, 1891, (pages 25 and 45) will show that this gratuity was two fold.

First: That there should be an adjustment upon principles of equity and justice, of the amount to which he was morally although not equally entitled, and

Second: That when so adjusted the amount should be paid not to said Rodman M. Price, but to said Rodman M. Price or his heirs.

Moreover, this claim thus created was under Section 3477 of the Revised Statutes of the United States made subject to the further provision that all assignments thereof or of any part thereof should be absolutely null and void, unless they were freely made and

executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issue of a warrant for the payment thereof, and further that such transfers, assignments and powers of attorneys must recite the warrant for payment, and must be acknowledged by the person making them before an officer having authority to take acknowedgments of deeds, and must be certified by the officer, and still further, that it must appear by the certificate that the officer at the time of the acknowledgment read and fully explained the transfer, assignment or warrant of attorney to the person acknowledging the same.

Look at the requisites:

1. It must be freely made.
2. It must be freely executed.
3. It must be after the allowance of the claim and the ascertainment of the amount due.
4. It must be after the issuing of a warrant for the payment thereof.
5. It must recite the warrant.
6. It must be acknowledged, and
7. The certificate of the officer must show that the assignor was made fully acquainted with the contents of the assignment and the purport thereof.

Any one of these requisites being lacking, the assignment was void.

If, therefore, there appears to have been in this case no assignment of the rights, either of Price or of any of these heirs, then there was no transfer of title from them of the claim, and if no transfer of title and no legal ownership in either of the defendants in error, then a decree of a Court, and particularly of a State Court, enjoining the plaintiffs in error from collecting these moneys must be without jurisdiction, and if so, erroneous.

The pleadings in this cause not only fail to disclose

that the requisites required by the Statute are present, but do disclose that all but one of them are absent, namely, the allowance of the claim and the ascertainment of the amount due by the officers of the Government. Every other one is lacking. No warrant has been issued; no paper reciting the warrant has been drawn; no acknowledgment has been taken; no certificate of an officer has been made, and above all other things, there is no freedom of will in the matter. On the contrary, Governor Price in his lifetime not only failed and refused to make such an assignment, but carried his resistance to the point of contempt of Court, and submitted to imprisonment, and died under attachment of contempt rather than make the assignment ordered, and these plaintiffs in error, since his death, have with equal resistance refused to do the thing which they are now sought to be compelled to do, and certainly without this freedom of action no valid transfer of their title, whether they get it as original takers or as representatives of their father can be said to have been accomplished.

I respectfully contend that the New Jersey Courts had no power to compel these plaintiffs in error to assign said claim, to collect the moneys and pay them over, or in anywise to part with their rights in the premises in the absence of jurisdiction to operate upon the chose in action itself or to sequester it, and that so following, they had no jurisdiction to enjoin these plaintiffs in error from proceeding to the collection thereof themselves. The theory that the Court may operate upon the persons of the plaintiffs in error cannot be an answer to the fundamental proposition that the claim itself and therefor the control of it, is beyond the jurisdiction of these Courts.

Fortunately, however, this question is not a case of first impression, and this Court has spoken upon the subject in such way as to cover all the branches of the question and leave no doubt as to the rulings of the Court on this proposition in both of its aspects.

The following cases are in point:

St. Paul & Duluth Railroad Co. vs. United States, 112 U. S., 733.

In that case the Lake Superior and Mississippi Railroad Company, had a contract in writing with the United States for carrying the mails. On the 20th of October, 1876, the Postmaster General gave notice to the company of a reduction in its compensation at a rate named, and on August 28, 1878, a further decrease was notified. The services during the first period were rendered by the railroad above named, and during the latter period by the St. Paul & Duluth Railroad, claiming to be the successor to all rights of the former under the contract.

The latter company's title arose under a judicial sale by virtue of a decree of a United States Circuit Court foreclosing a mortgage given by the Lake Superior and Mississippi Railroad Company to trustees to secure its bonds. The mortgage professed to convey all its real and personal property, and franchises. The decree for sale directed a sale of the mortgaged premises. Sale thereof was had and confirmed by the Court and conveyance made to the appellants. Suit was brought for the difference between the contract price and the sums allowed. The Court held that if the former company were suing it would have a right to recover under the authority of cases therein cited, but as to this company, neither the contract itself, nor the moneys collectable thereunder legally passed to the appellants for the reason that the claim was within the prohibition of Section 3477 of the Revised Statutes of the United States, for the reason that the transfer though voluntary in its inception by a mortgage for the security of a debt, was finally completed and made absolute by judicial sale and Mr. Justice Matthews, reading the opinion of the Court, adds that if the statute does not apply to such cases, it would be difficult to draw a line of exclusion which leaves any place for the operation of the prohibition.

Again, in Spofford vs. Kirk, 97 U. S., 484.

Kirk had a claim against the government for supplies furnished to the army during the war of the rebellion. He gave two orders on his agent in favor of third parties for payment out of the funds to be collected from the government for $600 each. Both were accepted, and so accepted, sold to innocent third parties in good faith. A warrant was issued for the amount allowed by the government, and delivered to Hosmer & Co., the attorneys of Kirk. The Assignee demanded the money, Kirk refused to endorse the warrant. Spofford, the Assignee, filed a bill in equity to enforce compliance with the orders and acceptances and to enjoin Hosmer & Co. from surrendering and Kirk from receiving the warrant. The Court held:

1. That the assignments were equitable.
2. But that they were void under Section 3477 of the Revised Statutes, because they lacked one of the requisites, namely, that of a warrant issued.
3. That therefore a Court of Equity had no jurisdiction.

The bill was filed to enforce compliance with the orders and acceptances, and to *enjoin* Hosmer & Co. from surrendering and Kirk from receiving the warrant.

Mr. Justice Strong, delivering the opinion of the Court, said that the complainant's case rests upon the assumption that, coupled with the acceptance of the drawees, they created an equitable lien upon the debt due from the United States to the drawer, exactly the contention, as the Court will perceive, that was set up in the Court of Chancery as the foundation for the decree prayed in the original bill in the cause at bar, and after stating the various arguments of counsel he adds, however stated, the equitable effect of the orders and acceptances independent of any statutory prohibition, if they had any effect, when they were drawn

was to transfer a portion of the drawers claim against the United States to the payees, and after citing Section 3477, above referred to, he holds that the matter is within the provisions of that Act. He uses this language:

"It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself." Page 488.

And on page 490, he uses this language, very much in point in the present case.

"We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the government."

The lack of requisite in that case, the Court will perceive, was simply that the assignment was made before a warrant had been issued, The assignment was voluntary and possessed the requisites in all other respects.

United States vs. Gillis, 95 U. S. 407.

Ryan had a claim against the United States for cotton seized by the Government. He transferred it to Gillis. Gillis sued in his own name in the Court of Claims. He died pending suit, and his wife was appointed Administratrix and admitted to prosecute. Judgment by the Court of Claims was given in her favor. The Government appealed. The Court held:

First:—That if the assignment was inoperative, a suit could not be maintained in the Plaintiffs' name.

Second:—That there was no right of assignment at common law of a claim against the Government, and no law of Congress authorizing it.

Third:—That the act of February 26th, 1853, now Section 3477, of the revised statutes universally prohibted such an assignment excepting under strict formalities detailing them in accordance with the statute; and reversed the judgment and dismissed the petition.

On this subject of this particular statute the Court, Mr. Justice Strong reading the opinion, used this language: "We think, therefore, that the Act of 1853 "is of universal application, and covers all claims "against the United States in every tribunal in which "they may be asserted. And such, we think, was the "understanding of Congress when the revised statutes "were enacted. In the revision, the Act of 1853 was "included and re-enacted. Sect. 3477." And with reference to the distinction sought to be drawn between the operation of a decree upon the person of the litigant, and that upon the Government itself, the learned Justice used this language: "It has been "argued on behalf of the claimant in this case that "this Act (the act of 1853) is applicable only to claims "asserted before the Treasury Department. * * * "But it is an unwarantable assumption to assert that "Congress had in mind only claims presented to the "Treasury Department." And after stating that many claims were set up in different methods, the Court said: "That Congress had all such claims in "view, and intended to prevent their assignment, and "debar any assignee from setting them up, is, we think "altogether probable." And added later, "nothing "that can justify our holding that when Congress "said all transfers or assignments, partial or entire, "absolute or conditional, of claims against the United

"States shall be null and void, they meant they should "be in operation only when presented to the account- "ing officers of the Treasury, but effective when pre- "sented everywhere else."

In the case at bar, it was contended, and held in the Court of Chancery and in the Court of Errors, that the assignment of a claim against the United States ordered by the Court of Chancery to be made by a debtor or his representatives to a Receiver, in aid of proceedings in said Court by a creditor, was not contrary to the provisions of this statute; that such an assignment to the Receiver, and assignments to him by operation of law in such proceedings are exceptions to the provisions of the statute; that the evils sought to be remedied by such an Act could not happen by such an assignment, and that the Court of Chancery had the jurisdiction to determine the right of distribution of such claim; and that opinion was founded upon an earlier adjudication by the same Court, not by way of final decree as has been stated, but by way of interlocutory order, decreeing Governor Price, against his will, to make an assignment of the claim in suit, and the ruling was contended for and held upon the ground that a Court of equity had a right to operate upon the person of the debtor and to compel him to do that which, according to their opinion, in equity he ought to do.

Everyone of these contentions is met and answered by this Court in the cases above cited.

In the St. Paul case, although the assignment was freely made, it was held void because it was completed and made absolute by judicial sale, although there was no doubt about the equity of the claim.

In the Spofford case, the contention that the orders drawn by the payee upon his agents, and exhibited by them, created in equity an irrevocable appropriation of their contents, are, as to the claim against the government, expressly negatived.

In the same case it was particularly held that such

an assignment, even when voluntarily made before a warrant had been issued, was void, and that the statute incapacitated every claimant upon the Government from creating an interest in any other than himself, and that its command was so comprehensive that it did not include merely an effort to operate upon the Government, but also an effort to operate upon the parties.

And in the Gillis case, that the provision that such transfer should be null and void applied not only when presented to the accounting officers of the Treasury, but was effective when presented everywhere else.

In the Gillis case, the prohibition was applied to the United States Court of Claims, the statute creating which was held not to have repealed the act invoked.

In the Kirk case, it applied to a Court of equity.

And in the St. Paul case to a Court of equity, and touched every branch of the subject. It held not only that the claim could not be enforced upon application to the Treasury Department, and could not be enforced by a suit at law or in equity, but that being void it could not be made the subject of an injunction against the original payee in his application for its payment.

It seems to me to be impossible to conceive of a case more fully covered by the decisions of this Court, nor one in which every contention of the Defendants in Error and the Court below has been more fully negatived than in the case at bar.

My learned friends urged below, and the Court held, and they will, no doubt, urge here, that this case falls within the class of cases which have been held by this Court to be exceptions to the provisions of the act, namely, voluntary assignments in bankruptcy, or insolvency and by operation of law:

Irwin vs. The United States, 97 U. S. 302.
Goodman vs. Niblack, 102 U. S. 556.

but in each of these cases the Court will perceive that

the ruling was carefully hedged, and that the state of facts is entirely different from the case at bar or the other cases hereinabove cited.

In Irwin's case, the claim was held to be transferrable because it was included in an assignment in bankruptcy, founded upon a voluntary petition of the claimant, and included in a schedule of assets thereto annexed.

The Bankruptcy Act, itself an Act of Congress, under which it arose, declared that all of the estate, real and personal, of the bankrupt, and all of his rights in equity and in action, should vest in the assignee. The claim itself was a valid one against the United States, over which the Court of Claims has jurisdiction, but which was barred by a two years statute of limitation, and the act of Congress reviving it merely removed the bar of that time limit.

The Court held that it was an asset under the circumstances, and that Section 3477 applied only to cases of voluntary assignments of demands against the Government, and not to cases where there had been a transfer of title by operation of law. But lest there should be any misunderstanding as to the meaning of the ruling, the Court defined the words "operation of law" to mean the passing of claims to heirs, devisees, or assignees in bankruptcy or insolvency.

Now the case at bar is not within, but is without the exception in the ruling of that case. This claim was never a legal one, neither could it have been collected in a Court of equity. It was not based upon considerations that would be valid against individuals. It did not pass by an assignment in bankruptcy or insolvency; it was not assigned, or included in schedules in insolvency; it was not voluntary; it was not a transfer by operation of law; but was like that in the St. Paul case above cited, sought to be effected by judicial action. It was not an assignment for the benefit of creditors in general.

This Receiver was appointed under section 93 of an

Act of the Legislature of the State of New Jersey, entitled "An Act respecting the Court of Chancery," Revision approved March 27, 1875, General Statutes of New Jersey, Vol. 1, page 389, in which, after having provided that when an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, leaving an amount remaining due exceeding one hundred dollars, the party suing out such execution might file a bill in Chancery to compel discovery; and after setting out the powers of the Court, and after certification to the Court of the evidence taken, the statute uses this language: "And thereupon it shall be lawful for the said Chancellor to appoint a Receiver, pendente lite, of the property and things in action belonging or due to or held in trust for said debtor as aforesaid, who thereby shall receive authority to possess, receive, and in his own name, as such Receiver, sue for such property or things in action; and the said Chancellor may order said judgment debtor to convey and deliver to such Receiver all such property and rights in action and the evidence thereof." From which it will be seen that this Receiver was not appointed in insolvency proceedings general to all the creditors of the debtor, but solely for the benefit of the one creditor, invoking the aid of the Court, and might be the result of contumacy on the part of a solvent debtor, and might operate to assign to one out of many creditors of an insolvent debtor the whole of the credits of his estate.

The very terms of the Act take the case out of the exception mentioned in the decision last quoted.

It seems to me that the State Court was in error upon the data before it, in holding under the provisions of this Act that any right passed to this Receiver, but that being a matter for adjudication below, I make no argument upon it here further than to cite the statute for the purpose of showing that it is not a bankruptcy or insolvency act, nor within any of the

reasons laid down by this Court in their decisions as to the exception to the rule of construction of Section 3477.

Note also the distinction between the St. Paul case and the Irwin case. Under the former, the transfer was made by judicial sale—in the latter by assignment in bankruptcy. The former was held to be void under the act, the latter to be good; and in the St. Paul case the Court uses this language: "If the "statute does not apply to such cases, it would be "difficult to draw a line of exclusion which leaves any "place for the operation of the prohibition." (Page 736).

So in the Goodman case above cited, the assignment was sustained, but only because it was a voluntary assignment in insolvency, and therefore on a parity with an assignment in bankruptcy, and also because it was an assignment of all his effects.

Without criticising the danger which is likely to arise, in the construction of statutes, by the efforts of Courts to do equity, may I not respectfully say that it seems to me the Court has gone as far in this line as it is safe to go in the consideration of this statute, if it is to be permitted to retain any force whatever. The question is not, is the Law a wise one—but is, what does it enact?

Other cases where this Act has been considered were cited below, but none of them applied to the case before the Court.

Baily vs. United States, 109 U. S. 432, was a case where the claimant had made a voluntary assignment of his claim, and the Government officers had recognized it and paid on it, and the ruling was that the original claimant would not be allowed to set up this statute against it.

In Hobbs vs. McClain, 117 U. S. 567, the plaintiffs were partners in a contract with the Government, taken in Peck's name. The money was recovered by Peck's administrator.

Prior to Peck's death, he had made an assignment in insolvency for the benefit of creditors.

After the judgment in favor of Peck's administrator, this assignee collected the money and sought to distribute it to Peck's creditors. The ruling was that the partners were entitled to it.

The question was not as to this statute, but was as to whether money already col ected, and in the hands of Peck's assignee, should go to his general creditors or to his partners who owned the money.

Freedman Savings Co. vs. Shepard, 127, U. S. 494. The ruling in this case was like the Bailey case, namely, that the Government having recognized and paid on the assignment by the assent of the assignor, the assignor was estopped from suing the Government, on the ground of the nulity of his own act.

The adjudication of this Court stands out clearly on these three lines:

First.—That under this Act no man can transfer to another a claim against the Government in such a way as to give the other a legal right of action against the Government for the recovery thereof, either at law or in equity, without all the formalities required by the Act, that transfer by the action of the Court is not a legal or valid transfer, and further, that the Courts having no jurisdiction in such case to recover the money from the Government, have no jurisdiction upon the person of the debtor by injunction or otherwise.

Second.—That transfers by assignments in bankruptcy or insolvency, when of all the assets, for the benefit of all the creditors, and assignments by operation of law, are exceptions to the statute, but that assignments by decree of a Court are not assignments coming within any of the exceptions and,

Finally.—That assignments which have been executed and recognized by the Government officials, and the money paid thereon, will be held to create an estoppel against the assignor when asking to recover it a second time; and there is no

case that I can find in which the construction of the statute has been modified in any respect, beyond the ones I name.

This case, therefore, does not come within any of the decisions under which this decree might be sustained. The fund in issue is a claim against the Government, for which no warrant has been issued. The owners of that claim are either Governor Price, his legal representatives, or these defendants as his heirs.

The groundwork of the claim on which the defendants in error base their contention is an order of the Court in an interlocutory proceeding (not by final decree), commanding an assignment of the claim by Governor Price before his death never consummated by compliance on the part of the Governor or those now before the Court, or any other person. It lacks the following requisites of validity prescribed by the Act:

First—Freedom of will.

Second—A written document.

Third—Witnesses.

Fourth—The issuing of a warrant by the Government.

Fifth—A recitation of such warrant.

Sixth—Acknowledgment before an officer.

Seventh—A certificate by the officer that he has read and explained the transfer to the grantor.

With reference to the plaintiff in error, the parties now before the Court, every one of these requisites is also lacking, and if every other requisite were decreed by the Court and enforced by process of attachment or otherwise, the paper would still lack the element of freedom of will, for none of them would freely execute it, and if any of them did execute it he would do so under duress; and without this element of freedom it would be void, and it is now void for lack of each one of these requisites.

Moreover, the complainants themselves in their bill admit this contention, for they allege that they are

without remedy, and that they have no equitable remedy elsewhere than in the Court of Chancery—a Court which has no jurisdiction to make the Government of the United States a party to any action or to enforce any decree it might make against it, or against moneys in its hands.

But in addition to the foregoing arguments based upon section 3477 of the Revised Statutes, I respectfully submit that the plaintiffs in error are original takers under the act. The language of the act is (see page 26 of the case), "And pay to said Rodman M. Price, or his heirs." The words are not "his executors or administrators," which would imply a general use, nor "Rodman M. Price, or his assigns," which would import transmissible qualities by conveyance; but they are "Rodman M. Price, or his heirs."

It is a fundamental rule of construction that words are to be used in their customary sense, if intelligible, and that in the absence of ambiguity in the language used, no exposition shall be made which is in opposition to the expressed words.

The word "heirs" has a well understood, often defined, accurate meaning. It applies to those, who, upon the death of a person intestate become the owners of his lands or other corporeal hereditaments. In this case it applies to the children of Governor Price, and it fits nobody else. It does not include administrators, executors, doweress or creditors. It is a personal provision for Governor Price, if he lives, but only for his heirs if he does not. It confers a gratuity—it does not pay a debt.

It will not admit of any other construction. It cannot be treated as it was by the Court below, namely, as a provision against death before the day of payment, and used in the sense of personal representatives, the thing dealt with being personalty, and to secure the money to his estate in the event of his death before the moneys are paid. And if for no other reason, for the reason that it was money paid into the hands of the Governor that was not legally owing to

him, and which could not be taken from him in any way excepting by his voluntary assignment under the statutes of bankruptcy or insolvency, voluntarily instituted by him.

The Governor had grown old in years; had been in the service of the Government for many years. He had been Governor of the State of New Jersey. He had been out of the money for many years. He had, in good faith, advanced it, as he believed, to the Government. It was not a legal claim, but the Congress of the United States was grateful, and desired to reimburse him in such a way that it would benefit him, or, in case of his death, his children. It cannot be presumed that the Congress of the United States, made up of men, many of them eminent in the nation, great numbers of them lawyers, could have been mistaken as to the meaning of the word they used.

I apprehend that this Court will not undertake to make a forced construction of an Act of Congress surrounded with the circumstances made known in this case. In the construction of a will, where the intent of a testator is evidently clear, Courts have gone to great lengths in their effort to effectuate that intention when ambiguously expressed, but I know of no case other than this where such an effort has been made use of in the construction of a statute affecting only individuals.

I submit to the Court that the rule of law which requires that words should be constructed in their ordinary meaning ought not to be violated in this case, and that there is no necessity for a forced construction, sufficient to justify the Court in resorting to it.

I respectfully submit, therefore,

First:—That under the language of the Act of 1891 these defendants are original takers of the fund in question, in so far as it was not collected by Governor Price in his lifetime.

Second:—That nothing has transpired in the proceedings to take away the title to the moneys in question either from Governor Price or the plaintiffs in

error, and that the claim against the Government has never been legally transferred, as to ownership, to the defendants in error or either of them, but remains now where it was placed by the Act of 1891.

Third.—That there being no jurisdiction in the Court of Equity to operate upon the fund or in anywise to aid the defendants in error in its collection, or to transfer its ownership, that it has no jurisdiction to operate upon the persons of the plaintiffs in error by injunction in the premises; and

Finally.—That the decree below should be reversed with costs, and a decree entered directing the payment of the moneys to the plaintiffs in error.

Supreme Court of the United States.

RODMAN M. PRICE ET ALS.,
PLAINTIFFS IN ERROR,

v.

ANNA M. FORREST ET AL.,
DEFENDANTS IN ERROR.

No. 105.

In Error to the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF JOHN C. FAY FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the Court of Errors and Appeals of New Jersey to reverse a decree of that court perpetually enjoining the plaintiffs in error from applying to or receiving from the Secretary of the Treasury an amount awarded to them by an act of Congress approved February 23, 1891.

The bill of complaint, which is styled "a bill of revivor and original bill in the nature of a supplemental bill," was filed in 1894 by Anna M. Forrest, administratrix of

the estate of Samuel Forrest, and Charles Borcherling, receiver in the suit of *Forrest* v. *Price*, to which this bill is a bill of revivor. The bill in substance sets out that, in 1857, Samuel Forrest, the intestate of one of the defendants in error, obtained judgment in the Supreme Court of New Jersey against Rodman M. Price, the ancestor of the plaintiffs in error, for some $17,000; that in 1874, seventeen years after the recovery of the judgment and fourteen years after the death of Samuel Forrest, this defendant in error was appointed administratrix of his estate and filed a bill against said Price to reach some interests in some real estate in Bergen County, N. J., claimed to belong to him, and his interest in a judgment against one Scott and Keyes recovered by him in the Supreme Court of New York. To this bill an answer was filed denying any interest in the real estate, and setting up that the judgment really belonged to Keyes, Price's judgment debtor in the New York judgment, who had years before settled the claim with Forrest. Thereupon the defendant in error dropped the suit, or, as the bill alleges, allowed it to sleep, for another period of a little over seventeen years, when, in 1892, she filed a petition alleging that in an accounting lately had between the United States and Price, the United States was about to pay him $45,000 in Treasury drafts payable to his order, and praying that he be enjoined from endorsing them till the further order of the court, that a Receiver be appointed and that he be ordered to endorse and deliver them to the Receiver; a temporary injunction was issued and a rule to show cause. The bill further charges that Price, as late purser in the navy, received drafts aggregating $45,000 as such late purser, U. S. N., and so endorsed them and received the proceeds between Sept. 5 and Oct. 3, 1892. That on Oct. 3, 1892, he filed his answer to the rule to show cause and the petition,

averring that the Forrest judgment had been paid and settled, and that the money coming to him from the Government was not amenable to complainant's claim even if valid, or could be lawfully paid to a Receiver. The bill then charges that the Forrest judgment was a confessed judgment, and then without further determination of the issue of payment set out in the answer, Mr. Borcherling. defendant in error, was, on Oct. 10, 1892, appointed Receiver in accordance with the prayer of the bill, of the "property and things in action" belonging to Price, particularly the four drafts described, "to hold subject to the further order of the Chancellor." The bill then avers the refusal of Price to turn over the drafts, his attachment for contempt, and an order on the 18th of May, 1894, adjudging him guilty of contempt, fining him $50, and ordering him to pay to the Receiver the money received by him within five days after service of copy of the order; that the order was served May 28, 1894 (making the five days expire June 2, 1894), and that Price departed this life June 8, 1894, without having complied with the order.

The bill further charges that this $45,000 was awarded to Price under the provisions of the Act of Congress approved Feb. 23, 1891, but on reconsideration of its action, by the officers of the Treasury Department, a further sum of $31,000 was about to be paid to Price, and upon such showing the Chancellor, as part of his order of May 18th, 1894, ordered said Price to execute, under his hand and seal, a paper writing consenting that the aforesaid balance should be paid to Borcherling, Receiver, and file it with the Treasurer of the United States, and also another instrument in writing assigning all of his property, real and personal, and all his rights and credits to Borcherling, Receiver,—neither of which papers was executed by Price,—thus ordering into the hands of the Receiver,

to respond to a disputed claim of $17,000, not only $76,000 in cash, but also everything else, real, personal and mixed, belonging to Price.

The bill then charges that the plaintiffs in error are seeking to collect this balance, which had been still further reduced by payments to Price to about the sum of $22,000, claiming it in their own right under the Act of Congress; and the bill, contending that the act bore no such construction, and that the Receivership worked a valid legal assignment of this claim against the United States to Borcherling, the Receiver, *pendente lite*, sought to enjoin perpetually the plaintiffs in error from demanding or receiving payment from the United States. To this bill the plaintiffs in error filed pleas setting up the Act of Feb. 23, 1891, (p. 25, Record) and claiming that by virtue of its provisions, upon the death of Rodman M. Price, without having received the payment therein directed, the money became theirs by virtue of their special designation in the act.

That the allowance made by Congress in said act was not in liquidation of any legal claim of their father, but a gratuity bestowed on him, or in the event of his death before the provisions of the act could be carried out, on his heirs, and they set up the facts out of which the allowance grew, together with the action of the United States, through its Attorney-General, showing it to have been neither a legal nor equitable demand. These pleas were overruled and an answer filed wherein they reiterate their contention in the pleas and set up the non-assignability of a claim against the United States. The cause was heard on bill and answer, and a final decree perpetually enjoining the plaintiffs having been passed (R., p. 48) and affirmed (R., p. 68) by the Court of Errors and Appeals, this writ was sued out.

The foregoing statement includes much that is not necessary to consider under this writ, but it was deemed best to set it out as explanatory of the litigation.

Assignment of Errors.

1. The court erred in holding that the plaintiffs in error were not beneficiaries of the United States under the act of Feb. 23, 1891.

2. That the allowance of the $75,000 by said act inured to the benefit of the estate of Rodman M. Price, deceased, as assets liable for the payment of his debts.

3. That the appointment of Borcherling as Receiver in the chancery suit of *Forrest* v. *Price* worked an assignment.

4. That the court below had jurisdiction to divert the appropriations made by the said act from the beneficiaries named therein, or to intervene between the United States and its purser in the adjustment of their accounts.

5th. In enjoining the plaintiffs in error from receiving the funds awarded to them under said act.

ARGUMENT.

The money coming to the plaintiffs in error or to their ancestor, Rodman M. Price, arose, as is developed in the pleadings, from the direction by Congress to the Secretary of the Treasury to credit the sum of $75,000. That part of the act was mandatory and gave a right that did not exist before. By reference to the circumstances of the case, it will be seen that it was a donation by Congress of this sum. Price had no legal or equitable claim to it. If he had a legal claim to it no remedial act would have been necessary, for the accounting officers could have extended

the credit, and the law officer of the United States, Attorney-General Cushing, had so held. That it was not an equitable claim Justice Grier, in the suit of the United States *v.* Price, in the U. S. District Court of New Jersey, in 1857, had decided (see charge of Justice Gier, Appendix 2). The facts were that Governor Price, without authority from any one, had advanced to an acting officer of the navy his own private funds. That officer had no authority to bind the Government in its receipt, and he never expended it for the benefit of the United States. The United States never received it, and could not, in the language of the court below, *restore it*, for they never had it. The case Emerson's heirs *v.* Hall, 13 Peters, 222, exhibits the difference between the payment of a claim and the grant of a donation. But another pregnant fact is that both the Senate and House committees that reported this legislation struck out the words "or assigns" from the bill, and that amendment was adopted by both houses. (See Senate bill 2276, Appendix 1.) Unless these words mean what they say, they were entirely unnecessary, for the act of 1846 (9 Stat. L. 41) would have fixed the person to receive the money had Congress not fixed it in the act.

SECOND.

That the appointment of Borcherling as Receiver in the chancery case of Forrest *v.* Price worked a legal assignment of Governor Price's interest, in view of the statutes forbidding such assignments, is certainly untenable. This act authorized an adjustment of accounts between the United States and its officer. It was designed to close the accounts of that officer on the books of the Treasury, but this decree proposed to step in between the Government and its officer, arrest the settlement, and direct the action of the

Secretary of the Treasury as to whom the fund should be paid. It was, in effect, to garnishee the pay and other allowances of an officer of the navy in the hands of the United States. If that can be done, there is no reason why public policy should forbid garnishment in the hands of the United States at law. All the evils sought to be avoided by that rule of public policy are present here. Not only that, but all the evils sought to be remedied by section 3477 R. S., forbidding assignment of claims, are present if confessing a judgment and appointing a Receiver works an assignment. If such a transparent and shallow device can overcome the statute, it becomes a dead letter. If the contention of the defendants in error is correct, to wit, that they have a valid legal assignment of the claim, there would be no need of this proceeding; their remedy would be against the United States either by mandamus or suit in the Court of Claims.

The case of St. Paul & Duluth R.R. *v.* U. S., 112 U. S. 733, seems to be decisive against the contention of the defendants in error.

JOHN C. FAY,
of Counsel with Plaintiffs in Error.

APPENDIX No. 1.

[Calendar No., 1624.

51ST CONGRESS, 1ST SESSION.

S. 2276.

[REPORT No. 1339.]

IN THE SENATE OF THE UNITED STATES.

JANUARY 23, 1890.

Mr. BLODGETT introduced the following bill; which was read twice and referred to the Committee on Naval Affairs.

JUNE 11, 1890.

Reported by Mr. CAMERON with amendments, viz: Omit the part struck through and insert the part printed in *italics*.

A BILL

For the relief of Rodman M. Price.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury of the United States be, and he is hereby, authorized and directed to adjust, upon principles of equity and justice, the accounts of Rodman M. Price, late purser in the United States Navy, and acting navy agent at San Francisco, California, crediting him with the sum paid over to and receipted for by his successor, A. M. Van Nostrand, acting purser, January fourteenth, eighteen hundred and fifty, and pay to said Rodman M. Price, *or* his heirs, ~~or assigns,~~ out of any money in the Treasury not otherwise appropriated, any sum that may be found due him upon such adjustment.

APPENDIX No. 2.

[*From the Trenton True American, March* 31, 1856.]

UNITED STATES CIRCUIT COURT.

SATURDAY, MARCH 29.

UNITED STATES OF AMERICA *v.* R. M. PRICE AND ANOTHER.

Charge of Judge Grier.

At the opening of the court this morning, Mr. Justice Grier proceeded to charge the jury in this case. We can give only a synopsis of it.

After stating that the action was brought on two official bonds of R. M. Price, as purser in the navy, each for $25,000, one bearing date the 22d of February, 1841, and the other the 31st of December, 1844, the learned judge disposed of two legal points taken by the defendant's counsel. The first point was, that the bond of 1841 had been rendered void by the alterations made in the duties of purser by the act of Congress of August 26, 1842, and the execution of a *new* bond under the act; the second point was, that the duties for which purser Price was detailed to California in December, 1848 (where the alleged defalcation is charged to have occurred), were extra official, and therefore his sureties were discharged. The judge decided against the defendant *pro forma* on account of these points for the purpose of having a verdict on the merits of the case, which was desired by both parties.

We have to deal, then, continued the judge, only with the question of fact, whether R. M. Price is a debtor to the Government or not. This is the important question, gentlemen of the jury, for you to try; and it is a question with regard to which the responsibility lies mainly on you.

It is our duty to lay down to you the general rules and principles by which you are to be governed, but it is yours to decide the fact.

The Government charges Mr. Price with a balance of $77,818.42. He claims certain allowances, which, as he contends, brings the Government in debt to him. These allowances consist of only four or five items.

1st, for disbursements to the amount of $31,835.45, the vouchers for which were lost by the burning of the steamer, on which he had taken his passage up the Alabama river on his return; 2d, for the salaries of his two clerks, amounting respectively to $639.45 and $514.91, which have never been allowed; 3d, for $45,000 Government moneys, paid over to his successor, A. M. Van Nostrand, December 31, 1849; 4th, for $75,000, his own private funds, paid over to said successor, for which Van Nostrand, by his receipt, agreed to account to the Government.

As to the last item, of $75,000, my charge to you is, that it cannot be allowed. Being private funds, if they were squandered by Van Nostrand, and not actually paid for the use of the Government, they cannot be charged against the Government. Had Van Nostrand applied them to Government purposes, then the Government would have been responsible to Mr. Price for them, but not otherwise.

The question for you to decide will be as to the validity of the remaining items claimed.

* * * * * * *

Verdict.

The jury, on Saturday afternoon, came into court and rendered a verdict for the defendants, and that the United States are indebted to the defendant, R. M. Price, in the sum of $195.39.